

RECENT FOURTH AMENDMENT DEVELOPMENTS IN USE OF FORCE

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I. USE OF FORCE IN GENERAL

A. LANDMARK DECISION

Graham v. Connor

490 U.S. 386 (1989)

Police conducted an investigative stop involving a diabetic who was experiencing an insulin reaction. Eventually, the officers determined that no wrong doing was involved. The officers drove the subject home and released him. However, during his encounter with the police, the diabetic person alleged that he suffered several injuries at the hands of the police. He sued under 42 U. S. C. §1983.

The Supreme Court held that excessive force claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest; or (4) whether he is attempting to evade arrest by flight.

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly revolving -- about the amount of force that is necessary in a particular situation. The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Case remanded.

B. HANDCUFFS

1. Young v. Prince George's County

355 F.3d 751 (4th Cir. 2004)

A police officer stopped an African American off-duty FBI agent (driver) and his passenger for a traffic violation. Both subjects complied with the officers directions. The driver informed the officer that he was a law enforcement officer and that he was armed. The officer handcuffed the driver. The officer then suddenly grabbed him by his neck, placed him in a headlock, and forcefully threw the driver to the ground and placed a knee in his back. The officer searched the driver and retrieved a handgun from the driver's front pocket. The officer then struck the driver in the back of the head with his forearm. The driver suffered injury as a result. The officer contacted the FBI, confirmed the driver's status as an FBI agent and then released the FBI agent. The FBI agent sued under 42 U.S.C. § 1983 alleging an excessive force violation.

On appeal, the court held that summary judgment should not have been granted by the district court on the excessive force claim. The officer reasonably sought to limit the driver's access to his firearm by handcuffing him. However, the force used by the officer after handcuffing the driver was not reasonable. A minor traffic violation was involved. Both persons were fully cooperative. The fact that a suspect is armed does not render all force used by an officer reasonable. The driver posed little threat once he was handcuffed behind his back.

2. Kopec v. Tate

361 F.3d 772 (3rd Cir. 2004)

A man and his girlfriend trespassed onto a frozen lake. An officer arrived to investigate. The officer sought to obtain their names, addresses, and phone numbers for his report. The man refused to provide this information and instructed his girlfriend not to do so either. The officer arrested him and handcuffed him behind his back. Within approximately ten (10) seconds of being handcuffed, the arrestee began to lose feeling in his right hand and asked the officer to loosen the handcuffs, but the officer did not do so. According to the arrestee, it took the officer about ten (10) minutes from the time he had handcuffed the man finally to loosen the handcuffs. The arrestee claimed to have permanent injury and filed an action against the officer under section 1983 alleging excessive force.

On appeal, the court held that officer is not entitled to qualified immunity on the excessive force claim and therefore the district court's grant of summary judgment was improper. The officer

faced rather benign circumstances rather than a dangerous situation involving a serious crime or armed criminals. The right of an arrestee to be free from the use of excessive force in the course of his handcuffing clearly was established and a reasonable officer would have known that employing excessive force in the course of handcuffing would violate the Fourth Amendment.

3. **Meredith v. Erath**

342 F.3d 1057 (9th Cir. 2003)

IRS agents executed a search warrant upon the property of a woman who was being investigated for tax violations. Upon entering the third floor, the agents encountered another woman who was not the target of the investigation. This woman loudly told the agents that the search was illegal and asked to see a search warrant. When the woman repeated her request to see a search warrant the agent grabbed her by her arms, forcibly threw her to the ground and, twisting her arms, placed handcuffs on her wrists. The woman complained several times that the handcuffs were too tight and were causing her pain, but for 30 minutes they were left as they were; thereafter, they were loosened so that they would not be painful, but would nonetheless restrain her. The handcuffs were removed several hours late and the woman was told she could leave. The woman claims she suffered extensive bruising. She filed a lawsuit claiming that the agent used excessive force in handcuffing her.

On appeal, the court held that the IRS Agent was not entitled to qualified immunity on summary judgment as to: (1) the excessive force claim; and (2) the claim that she was unlawfully detained for 30 minutes in overly tight handcuffs that caused her pain. The woman loudly asked several times to see a search warrant. The woman did not pose a safety risk and made no attempt to leave the property. The agent was investigating income tax related crimes, which (although felonies) are nonviolent offenses. The woman objected vociferously to the search and she "passively resisted" the handcuffing, but the need for force, if any, was minimal at best.

4. **Pena-Borrero v. Estremeda**

365 F.3d 7 (1st Cir. 2004)

Police officers arrived at a subject's home and informed him he was under arrest. The subject told the officers that the warrant already had been executed. Two officers instructed the subject to come outside. As he opened the door to comply, officers entered the house, pushed his arms behind his back, and handcuffed him. In the course of the arrest, he re-injured his ribs and back, which previously had been injured in a car accident. The officers took

him to police headquarters. A judge reviewed the court papers, ordered him released, and apologized for the mistake. The subject brought suit under 42 U.S.C. §§ 1983 alleging a Fourth Amendment violation due to the use of excessive force.

On appeal, the court held that the allegations of forceful handcuffing were insufficient to state a constitutional claim of excessive force. Allegations of harsh language and handcuffing that was accomplished by pushing his arms behind his back, causing injury exacerbated by prior non-obvious injuries are no more than the degree of physical coercion, typically attendant to an arrest. Officers were facing unknown circumstances as they entered his home.

5. **Crumley v. City of St. Paul**

324 F.3d 1003 (8th Cir. 2003)

An officer stopped a vehicle containing two occupants for a traffic violation. A computer search revealed an outstanding warrant for one of the individuals. An attorney approached the passenger in the stopped vehicle and handed him a business card. The officer shouted at the attorney to "get away from his stop." He struck or pushed the attorney approximately five times and then spun her around and handcuffed her. He then arrested her. At the police station, the attorney became aware of an injury she had received from the handcuffs: one of her wrists was bleeding. She was re-handcuffed, but in such a way as not to aggravate her injury. After being found not guilty by a jury, the attorney sued pursuant to 42 U.S.C. § 1983 alleging excessive force in violation of the Fourth Amendment.

On appeal, the court held that district court's grant of summary judgment for the officer was proper. No reasonable jury could have found the police officer used excessive force by pushing or shoving the attorney to effect the arrest. Similarly, no reasonable jury could have found the police officer used excessive force in securing the handcuffs. The attorney did not allege or present any medical records indicating she suffered any long-term or permanent physical injury as a result of the handcuffs. For the application of handcuffs to amount to excessive force there must be something beyond allegations of minor injuries.

C. COMPLIANCE TECHNIQUES

1. Amnesty America v. Town of West Hartford

361 F.3d 113 (2nd Cir. 2004)

Two anti-abortion demonstrations took place at a clinic that performed abortions. The protestors entered the Women's Center and chained themselves together in order to block entry to the area in which medical services were provided to prevent women from obtaining abortions. When the police arrived, the protesters employed "passive resistance" techniques. The protestors allege the police dragged them out of the building by their elbows, using choke holds, and lifting them off the floor by their wrists. The protestors assert that many demonstrators suffered excruciating pain that caused some to black out, and others suffered lasting physical damage as a result of their treatment. At the first demonstration, the Town's police chief was present at the Women's Center during the demonstration, and supervised his officers' handling of the situation. At the second demonstration, the police chief was not only present but participated in the removal of the protestors. Thereafter, the protestors and Amnesty America, a self-described pro-life organization, filed suit against the Town and the police chief under 42 U.S.C. § 1983.

On appeal, the court held that the grant of summary judgment by the district court was improper concerning a negligent supervision theory that resulted in excessive force. However, the grant of summary judgment on the failure to train theory was proper. The protestors' allegations are sufficient to create issues of fact as to the objective reasonableness of the degree of force used by the police officers. According to the protestors, the police officers' excessive uses of force included lifting and pulling protestors by pressing their wrists back against their forearms in a way that caused lasting damage; throwing a protestor face-down to the ground; dragging a protestor face-down by his legs, causing a second-degree burn on his chest; placing a knee on a protestor's neck in order to tighten his handcuffs while he was lying face-down; and ramming a protestor's head into a wall at a high speed. The determination as to the objective reasonableness of the force used must be made by a jury following a trial. However, the plaintiffs proffered no evidence of the Town's training programs or advanced any theory as to how a training deficiency caused the police officers to use excessive force.

2. **Johnson v. County of Los Angeles**

340 F.3d 787 (9th Cir. 2003)

Two persons robbed a bank. Law enforcement authorities spotted the suspect vehicle and an hour-long chase occurred, reaching speeds of nearly one hundred miles per hour. The chase ended when the driver crashed into a concrete center divider and the vehicle skidded until it came to a stop. Two deputies reached the immobilized getaway vehicle. The driver was pulled from the car first. A deputy yanked, pulled, jerked and twisted the rear passenger who exclaimed that the deputy was hurting him. After about forty seconds, the deputy succeeded in removing the rear passenger and handcuffed him. It was later determined that the rear passenger permanently had been rendered a paraplegic at some unknown point in the course of the crash and arrest. The rear passenger sued the county and other persons, including the deputy who pulled him from the car.

On appeal, the court held that the district court erred in denying summary judgment to the deputy. The deputy was facing armed suspects who had led police on a long, dangerous chase that ended in a crash. The driver attempted to escape on foot. The rear passenger was hiding in the back seat. The rear passenger was moving his hands around while hidden from view under a cover, causing concern about his possible possession of a weapon. The deputy applied hard pulling and twisting to extract a moving armed robbery suspect from a getaway. The force used to remove the rear passenger from the car and take him into custody was "objectively reasonable" and cannot be deemed excessive. Even if qualified immunity was considered, the deputy reasonably could have believed that his conduct was lawful under the circumstances.

3. **Drummond v. City of Anaheim**

343 F.3d 1052 (9th Cir. 2003)

A subject had a history of mental illness (bipolar disorder and schizophrenia), had run out of medication and was hallucinating and paranoid. The police were called to help protect the subject because he was darting into traffic. The subject was unarmed, hallucinating and in an agitated state. Before an ambulance arrived, officers decided to take him into custody for his own safety. An officer knocked the subject to the ground, and cuffed his arms behind his back as he lay on his stomach. Two officers put their knees into the subject's back and placed the weight of their bodies on him. The subject soon fell into respiratory distress. After a "hobble restraint" was used, the subject went limp. Paramedics arrived and revived the subject after he lost consciousness. However, the subject sustained brain damage, fell into a coma and

is now in a "permanent vegetative state." A medical expert states the subject suffered a cardiopulmonary arrest caused by lack of oxygen to his heart due to his inability to breathe caused by mechanical compression of his chest wall. A lawsuit was filed under Section 1983 alleging excessive force.

On appeal, the court held that the district court's grant of summary judgment was improper. It would have been clear to a reasonable officer at the time of the encounter that the force alleged was constitutionally excessive. Some degree of physical restraint may have been necessary to prevent the subject from injuring himself. However, there was no justification for the degree of force used here. No underlying crime was at issue. Rather the subject was acting in an emotionally disturbed manner and might injure himself. Second, after the subject was knocked to the ground and handcuffed, he posed only a minimal threat to anyone's safety. Finally, he was not resisting the officers; there was therefore little or no need to use any further physical force. Kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and reasonable officers would have been aware that such was the case.

D. PEPPER SPRAY

1. **Garrett v. Athens-Clarke County**

378 F.3d 1274 (11th Cir. 2004)

A high-speed chase ensued after an officer tried to stop a vehicle for a burned-out taillight and a suspicion that the driver was under the influence of alcohol. The chase reached speeds of up to 75 miles per hour eventually covering 30 miles. Officers attempted to end the pursuit by using rolling roadblocks and other maneuvers, but the fleeing driver avoided all of those devices. Finally, the vehicle went into a ditch and the chase ended. After repeatedly refusing to get out of the vehicle, the officer reached into the truck and pulled the driver out. The driver struggled with an officer over the officer's pistol and then ran. Despite orders to stop and to get on the ground, the suspect continued running. An officer hit the suspect in the upper thighs and the suspect fell to the ground. The officer dove on top of the suspect and handcuffed him. The suspect yelled that the officers were going to have to kill him to take him.

As the officers got the suspect to his feet, the suspect kept kicking, swinging, yelling, and fighting, trying to push and drag the officers. The suspect then kicked an officer in the chest; and the

suspect and officers then struggled on the ground with the suspect still fighting and kicking. At this point, an officer attempted to apply a hobble restraint cord. The suspect violently resisted by kicking and bruised the officer. Another officer then gave the suspect a verbal warning to stop kicking or he would be sprayed with pepper spray ("OC spray"). The suspect did not stop kicking. The officer applied the OC spray and the officers overpowered the suspect. The suspect moaned and at this point became compliant.

Without delay, the officers tied his ankles together, his hands were cuffed together behind his back, and his hands and feet were strapped together. The officers carried the suspect behind a police car. The car was running, and the suspect was on his chest near its exhaust pipe. An officer made sure the suspect had a pulse (which he did). The suspect did not complain about the OC spray, and no one decontaminated him with water. An ambulance was called. Paramedics found the suspect fettered and lying in a prone position. The paramedics detected no pulse. The suspect was taken to a medical center where he was declared dead. A medical examiner performed an autopsy and listed the cause of death as "positional asphyxia." Methamphetamine and amphetamine in the suspect's system were listed as contributing factors. The suspect's mother brought a lawsuit against the officers.

On appeal, the Court held that the officers did not violate the suspect's Fourth Amendment right to be free from excessive force. Further, qualified immunity would apply even if the officers had violated the suspect's rights. The suspect repeatedly placed officers' lives and innocents' lives in danger by engaging in a multi-county vehicle chase that did not end until the suspect had crashed twice. Once the truck was finally stopped, the officers tried to restrain the suspect by simple handcuffing, but the suspect ran and fought with the police and kept on violently kicking and resisting until sprayed with the OC spray. As soon as he was sprayed and became compliant, the officers immediately fettered him. The officers' acts were not beyond the outside borders of objective reasonableness. As such the defendants did not violate the suspect's Fourth Amendment right to be free from excessive force. Even so, qualified immunity would apply even if the defendants had violated the suspect's rights.

2. **Isom v. Town of Warren**

360 F.3d 7 (1st Cir. 2004)

A suspect entered a liquor store and attempted to hold hostage two women employees. One of the employees activated a silent alarm. Both women managed to escape. A police sergeant arrived and learned that the suspect was carrying an axe. The sergeant entered the store with his gun drawn. The suspect was initially silent, but eventually told the officer his name and said that "he was going to die today." The suspect then became non-responsive. He was holding the axe in his right hand with a tight grip, and it was raised slightly up. Other officers arrived and entered the store.

After several minutes, a plain clothes officer started to spray the suspect with the pepper spray and yelled for the suspect to put down the axe. The spray appeared to have no effect on the suspect. After the spray stopped, the suspect turned toward one of the officers and then suddenly lifted the axe and charged toward the sergeant and the officer. When the suspect was within ten feet of the officers, still running toward them with the axe raised, the two officers fired their guns and killed the suspect. The suspect's mother sued asserting claims of excessive use of force under 42 U.S.C. § 1983. The case went to trial. At the close of the plaintiff's case, the district court granted a defense motion for judgment as a matter of law.

On appeal, the court held that the district court's granting of the defense motion for judgment as a matter of law was proper. The police encountered a situation fraught with hazard for themselves and for the suspect; the suspect was a distraught, seemingly suicidal man, who had briefly held two hostages and was refusing to comply with continuous officer requests that he put down an axe. There was no evidence from which the jury could rationally draw the conclusion that the officers' actions were objectively unreasonable.

3. **Champion v. Outlook Nashville, Inc.**

380 F.3d 893 (6th Cir. 2004)

A 32 years old autistic person completely lacked the ability to care for himself on account of his autism. A caregiver became frightened over the autistic person's actions and called 911. An officer arrived. The caregiver told the officer that the person was mentally ill, but did not tell the officer that the autistic person was non-verbal and non-responsive. The officer approached the autistic person. The person was hitting and biting himself and began to approach the officer. The officer told him to stop, but he kept advancing. The officer retreated but the autistic person grabbed

her shirt. The officer pushed his hands away and delivered a short burst of pepper spray to the person's face. Other officers arrived.

Officers tackled the subject to the ground. The officers handcuffed him. The subject was kicking, so officers used a "hobble device," to bind his ankles together. After several minutes of being on the ground, the subject began to vomit. An ambulance was called. The EMTs arrived. An EMT failed to find a pulse on the person. The officers removed the handcuffs. The subject went into cardiac arrest; despite effort to resuscitate him, he was pronounced dead on arrival at the hospital. Five lay witnesses testified that the officers continued to sit or otherwise put pressure on the person's back while he was prone on the ground and continued to use pepper spray on the subject after he was subdued and stopped resisting. The autistic person's family brought suit pursuant to 42 U.S.C. § 1983. The officers were found liable at trial. After post-verdict motions were denied, the officers appealed.

On appeal, the court held that the district court properly denied the post-verdict motions. While the officers undoubtedly faced unenviable choices in their interactions with the autistic person, they are not entitled to qualified immunity. It is assumed that the officers lay on top of a mentally retarded individual who had stopped resisting arrest and posed no flight risk, and sprayed him with pepper spray even after he was immobilized by handcuffs and a hobbling device. The use of such force is not objectively reasonable. No reasonable officer would have continued to spray a chemical agent in the face of a handcuffed and hobbled mentally retarded arrestee, who was moving his or her head from side to side in an attempt to breathe, after the arrestee vomited several times. No reasonable officer would continue to put pressure on that arrestee's back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding the arrestee's legs.

E. TASER

Draper v. Reynolds

369 F.3d 1270 (11th Cir. 2004)

At approximately 11:30 p.m., a deputy sheriff stopped a tractor trailer truck because its tag light was not appropriately illuminated. After the driver appeared hostile, the deputy instructed the driver to meet him behind the truck, a location in view of a police camera activated in the patrol car. The deputy also un-holstered his taser gun, which he kept in his hand. The driver immediately began shouting and complaining about the deputy's shining a flashlight in his face. During the encounter, the driver was belligerent, gestured animatedly, continuously paced, appeared

very excited, and spoke loudly. The deputy repeatedly asked the driver to stop yelling and informed the driver that he would be taken to jail if he continued to yell. The deputy asked the driver approximately five times to retrieve his driver's log book and bill of lading. After the fifth time, the deputy discharged his taser gun at the driver's chest. The driver fell to the ground. The deputy told the driver to stay on the ground and threatened to discharge the taser gun again if the driver did not comply. A back-up officer arrived and the driver was handcuffed, searched, and placed in the back of the police car. The deputy charged the driver with obstruction of an officer and with having an improperly illuminated taillight. The driver filed suit against the deputy under 42 U.S.C. § 1983 alleging excessive force.

On appeal, the court held that the district court's grant of summary judgment in favor of the deputy was proper. From the time the driver met the deputy at the back of the truck, the driver was hostile, belligerent, and uncooperative. No less than five times, the deputy asked the driver to retrieve documents from the truck cab, and each time the driver refused to comply. Rather, the driver used profanity, moved around and paced in agitation, and repeatedly yelled at the deputy. There was a reasonable need for some use of force in this arrest. Although being struck by a taser gun is an unpleasant experience, the amount of force the deputy used - a single use of the taser gun causing a one-time shocking - was reasonably proportionate to the need for force and did not inflict any serious injury. The deputy's use of the taser gun did not constitute excessive force, and the deputy did not violate the driver's constitutional rights in this arrest.

F. FLASHBANG DEVICES

Boyd v. Benton County

374 F.3d 773 (9th Cir. 2004)

Two suspects stole jewelry, cash, and a .357 magnum revolver during an armed robbery of a jewelry store. Following surveillance at an apartment, a high-speed chase occurred. Officers stopped the vehicle and took both persons into custody. Firearms were recovered. One of the suspects was identified by the store owner as one of the robbers. Officers then obtained a search warrant for the apartment for the remainder of the stolen jewelry and the .357 magnum. The officers enlisted the aid of a SWAT Team to secure the apartment before conducting the search. The officers executed the search in the early morning hours. After the officers announced their presence, a deputy reached inside the door of the dark apartment and, without looking, tossed the flash-bang near the front wall and a few feet from the door. As it turned out, a woman was sleeping on the floor, near the front wall where the flash-bang came to rest. Consequently, the woman suffered burns on her forearm when the device ignited. Moments later, the SWAT Team entered and secured the apartment, followed by the officers

who conducted the search. After the officers secured the apartment, the woman was treated for her injury and later transported to a local hospital. The woman brought suit under 42 U.S.C. § 1983 for violation of her Fourth Amendment rights during the execution of the search warrant due to the use of the "flash-bang" device.

On appeal, the court held that the district court properly granted summary judgment. A constitutional violation occurred because the officers' use of force was constitutionally excessive. The officers had information leading them to believe that up to eight people could be sleeping within the apartment. Without considering alternatives such as a controlled evacuation followed by a search, the officers deployed the explosive flash-bang device in the room without looking or warning the occupants. Given the inherently dangerous nature of the flash-bang device, it cannot be a reasonable use of force under the Fourth Amendment to throw it "blind" into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury. Each officer involved in the search operation was an "integral participant" and therefore each defendant may be held liable for the Fourth Amendment violation. However, the officers are entitled to qualified immunity because the Fourth Amendment right to be free from dangerous flash-bang devices under these circumstances was not clearly established. Also, the city did not deliberately fail to train or control its officers as to when and how to deploy flash-bang devices. Therefore, the city is not liable under Monell, and summary judgment was appropriate.

G. BEANBAG ROUNDS

Bell v. Irwin

321 F.3d 637 (7th Cir. 2003)

After a bout of drinking, a husband threatened his wife, who phoned the police for protection. An officer arrived. The suspect refused to admit the officer to the home (or to come out) for discussion. A background check revealed that the suspect had a history of arrests for domestic violence, unlawful use of weapons, obstruction of justice, and drunk driving; the wife told the officers that her husband had attempted suicide. The police chief saw the suspect through a window. The suspect was holding several knives and a meat cleaver. The suspect drove one of the knives into a wall near the front door and threw several others into the yard in the direction of the police. He told the chief that he would kill any officer who entered and then kill himself; the suspect insisted that he had nothing left to live for, did not care about anyone else's life either, and would come out only "feet first." The state police were called to assist. The suspect opened the door and threatened to blow up his home using propane and kerosene in tanks immediately outside. An officer saw the suspect lean toward a tank with what appeared to be a cigarette lighter; in response the officer fired

beanbag rounds from a shotgun at the suspect's arm and torso. The first three rounds staggered, but did not stop the suspect; a fourth brought him down. The suspect was a moving target, and one round hit him in the head. Officers took him to the hospital; he arrived unconscious and was treated for injuries to the head and upper left arm. The suspect filed a suit under 42 U.S.C. § 1983.

On appeal, the court held that the grant of summary judgment by the district court was proper. The court said that the suspect should have thanked rather than sued the officers. True, he suffered injury at their hands, but in his depressed and irrational state, aggravated by liquor, he might have done himself or others greater injury had they not intervened. Under the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, not how they appear in the courtroom to a cross-section of the civilian community. Since Graham we have regularly treated the reasonableness of force as a legal issue, rather than an analog of civil negligence. Judges rather than juries determine what limits the Constitution places on official conduct. To say that police officers have acted within the bounds that the Constitution sets is not necessarily to say that they have acted wisely. States may choose to afford additional protections of personal safety and require the police to wait even when federal law permits them to act.

H. POLICE DOGS

1. Dennen v. City of Duluth

350 F.3d 786 (8th Cir. 2003)

A twenty-year-old university honor student attended a college party and consumed a large amount of alcohol. At approximately 2:30 a.m., a police K-9 officer on routine patrol saw the student walking. The student was behaving curiously. Suspicious, the officer turned his vehicle around and the student sprinted and disappeared. The officer got out of his vehicle and took his K-9 dog with him for his own protection. Because the officer was not tracking or apprehending the student, the officer did not put the police dog on a leash nor give him any commands. The police dog and officer followed a scent into a wooded area. The police dog ran some distance ahead of the officer but as soon as the dog entered the wooded area, the officer leashed the dog. The officer heard movement in the area. The officer identified himself, announced the dog's presence, and ordered whoever was hiding in the woods to come out. Shortly thereafter, the officer heard the sounds of breaking brush and a loud crash. The officer discovered the student lying face-down in a creek bed at the bottom of a deep, muddy, and steep ravine. The student was seriously injured and

was rushed to a hospital. Unfortunately, the student suffered a severe head injury and remained in a coma for several weeks. Toxicology reports later revealed the presence of barbiturates, amphetamines, and an alcohol level of .227 in the student's blood. The student spent over a year in rehabilitation and still suffers from some of the effects of the brain injury. As a result, the student sued alleging violations of 42 U.S.C. § 1983.

On appeal, the court held that the district court properly granted summary judgment to the city and the officer. Using a dog without a leash was objectively reasonable under the circumstances. At no time did the officer give the dog a command to attack, send, or seek. The officer initially did not leash the dog because he wanted to have both hands free in case he should need to use them. The officer had a concern for his own safety. He was walking at night in a dark area behind houses in a part of town known for some rowdiness and criminal activity. The person that he wanted to question had just disappeared after behaving curiously. He did not know if that person had a weapon or would jump out at him from behind a house. The officer taking the police dog off the leash was at that time objectively reasonable and therefore the claim was properly denied.

2. **Miller v. Clark County**

340 F.3d 959 (9th Cir. 2003)

A sheriff's deputy was on routine patrol when he became suspicious of the driver of a car. The deputy conducted a computerized check and discovered that the car bore a license plate registered to a different vehicle. The deputy attempted to stop the vehicle and the driver refused. The driver slowed down, a passenger exited and the deputy pursued the passenger. The driver drove the car up a driveway. Soon another deputy arrived with his police dog and found the car, now unoccupied, in front of a house. The deputy learned that the suspect lived in the house with his parents and that he was wanted for a felony. He was told that the suspect had been seen running away from the house a few minutes earlier. The deputy saw a seven (7) or eight (8) inch knife on the car seat.

Two deputies and the police dog tracked the suspect across the large rural property. At one point, the deputy ordered the suspect to come out or the dog would be released. There was no response. The deputy then let the dog off his leash and gave the dog a command. The dog was breaking through the underbrush. About one minute later, the deputy heard the suspect scream. The deputy immediately ran into the woods and saw that the suspect was

unarmed and that the police dog was biting his upper arm. The deputy ordered the dog to release the suspect, and the dog promptly complied. The suspect was arrested and taken to the hospital with a severe injury. The suspect's injury went as deep as the bone. He underwent surgery by an orthopedic surgeon and spent several days in the hospital. The suspect continues to suffer lingering effects from the dog bite. The suspect then filed an action against the deputy and county under 42 U.S.C. § 1983 alleging excessive force in violation of the Fourth Amendment.

On appeal, the court held that the district court's judgment for the defendants was proper. The officer's use of the dog here did not violate the suspect's Fourth Amendment rights. Deadly force means force reasonably likely to kill. The risk of death from a police dog bite is remote. The suspect was wanted not only for a misdemeanor traffic infraction (mismatched license plates), but also for a prior felony. More importantly, the deputy knew that if the suspect's defiant and evasive tendencies turned violent, and the suspect staged an ambush, the suspect would possess a strategic advantage over the deputies. The deputy was entitled to assume that the suspect posed an immediate threat to his and to the other deputy's safety. The suspect was still evading arrest by flight. All three Graham factors favor the government. Further, the deputies had attempted several less forceful means to arrest the suspect. The use of a police dog to bite and hold the suspect until deputies arrived on the scene less than a minute later was a reasonable seizure that did not violate the suspect's Fourth Amendment rights. There was no use of excessive force under the circumstances.

II. USE OF DEADLY FORCE

A. LANDMARK DECISION

Tennessee v. Garner

471 U.S. 1 (1985)

Police officers were dispatched to answer a "proowler inside call." An officer went behind the house. The officer heard a door slam and saw someone run across the backyard. The fleeing suspect stopped at a 6-foot-high chain link fence at the edge of the yard. With the aid of a flashlight, the officer was able to see the suspect's face and hands. He saw no sign of a weapon, and was reasonably sure the suspect was unarmed. The officer believed the suspect to be 17 or 18 years old. The suspect began to climb over the fence. Convinced the suspect would elude capture, the officer shot the suspect. The bullet hit the suspect in the back of the head. The suspect was taken by ambulance to a hospital, where he died. Ten dollars and a purse taken from the house were found on his body. In using deadly force to prevent the escape, the officer was acting under the authority of a

Tennessee statute and pursuant to police department policy. The suspect's father brought an action under 42 U.S.C. § 1983 for violations of the suspect's constitutional rights.

On appeal, the Supreme Court said that the shooting of the suspect by the police officer violated the Fourth Amendment. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. However, where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. The officer could not reasonably have believed that the suspect -- young, slight, and unarmed -- posed any threat. The officer did not have probable cause to believe that the suspect, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

B. SHOOTING CASES:

1. Mace v. City of Palestine

333 F.3d 621 (5th Cir. 2003)

Police responded to complaints of a disturbance at a mobile home park. Officers found a subject inside a mobile home with the door open, yelling, cursing, brandishing an eighteen (18) to twenty (20) inch sword and breaking windows. Blood was on his hands and on the broken windows. The officers, with weapons drawn, told the suspect to drop the sword. The suspect told the officers to stay away from him and threatened to kill himself. He claimed to be an expert in martial arts and made several martial arts motions with the sword in an effort to keep the officers at bay. The Chief of Police arrived. While the Chief was talking to him, the suspect exited the mobile home. The suspect continued to brandish and make punching motions with the sword. During this time the suspect was between eight (8) and ten (10) feet away from the officers. When the suspect turned, and raised the sword toward the officers, the Chief shot the suspect in his right arm, causing him to drop the sword. The suspect attempted to flee, disobeyed orders to lie down, and fought off a police dog. The officers finally subdued the suspect with pepper spray and pulled him to the ground. Ambulance personnel began treating the suspect but the suspect died at the hospital. Thereafter, the suspect's mother and his

estate, brought a 42 U.S.C. § 1983 suit alleging the use of excessive force.

On appeal, the court said that the use of deadly force by the Chief of Police was not objectively unreasonable and therefore the Chief was entitled to qualified immunity. The suspect was intoxicated, agitated, breaking windows, shouting, and brandishing an eighteen to twenty inch sword. The suspect did not respond to commands to drop his sword or to stop moving toward the officers. He continued to make punching motions with his sword while no more than ten feet away from the officers. When he was shot, the suspect was raising his sword toward the officers. This event took place in the close quarters of a mobile home park, which limited the officers' ability to retreat or to keep the suspect from harming others in the area. It is not objectively unreasonable for an officer in that situation to believe that there was a serious danger to himself and the other officers present. Because the Chief of Police did not violate the suspect's constitutional right to be free from excessive force, he is entitled to qualified immunity and the city is entitled to summary judgment.

2. **Flores v. City of Palacios**

381 F.3d 391 (5th Cir. 2004)

One evening a police officer sought to detain a sixteen (16) year old woman because she was parked on the wrong side of the road and because, when he shined a spotlight on her car, several people fled from the vicinity. The woman did not respond to the officer's repeated commands that she stop and instead drove away. The officer shot her car to prevent her escape. The officer's shot entered the car's bumper just above the tailpipe and ultimately lodged in the back of the muffler. The minor suffered no immediate physical injury, though her car was damaged. When the woman stopped, the officer arrested her for evading detention. It was determined that the sixteen years old was in violation of a weeknight curfew for minors. Later investigation revealed alcohol in the area surrounding where the car was parked, though no evidence suggested she had been drinking. The woman sued the officer and the city pursuant to 42 U.S.C. § 1983 claiming excessive use of force.

On appeal, the court held that the district court properly denied summary judgment on the excessive force claim. The officer used physical force by shooting at her car, and the termination of her freedom of movement was accomplished by the shot to her car. The suspect's perception of her detention is not considered when it is accomplished by means of physical force. It was clearly

established that shooting toward a person is a use of physical force. It was also clearly established that a use of physical force that succeeds in stopping a fleeing suspect constitutes a seizure. It was clearly established that stopping a moving car by intentionally shooting it constitutes a seizure. It was clearly established at the time that psychological injuries can be sufficient to state a Fourth Amendment excessive force claim. The officer was on notice that using force carrying with it a substantial risk of causing death or serious bodily harm is "deadly force." The officer was also on notice that deadly force would only be justified by a reasonable belief that he or the public was in imminent danger. The officer reasonably should have known that his action caused a substantial risk of death or serious bodily harm. As such, the officer is not protected by qualified immunity as to the minor's Fourth Amendment excessive force claim.

3. **Scott v. Edinburg**

346 F.3d 752 (7th Cir. 2003)

A police officer was off-duty and driving his personal car, a red convertible. The officer learned that an individual had entered his car and was trying to steal it. The officer ran back to the car and stopped near the rear bumper. The car backed up toward him, so that the officer was forced to run backward to avoid being hit. As the vehicle backed up, the officer yelled "stop, police" and drew his revolver. The car stopped backing up and began to drive forward. The officer fired a shot. The car sped off. There were between twelve and fourteen patrons in the gas station parking lot. While the car was still in the parking lot, the officer fired a second shot. The vehicle then exited the parking lot. The officer followed on foot and fired at least six more shots. Shortly thereafter, the suspect died, and the car crashed. It is not clear which gunshot killed the suspect but the fatal shot was one of the first few shots fired. The family filed a suit under 42 U.S.C. § 1983 alleging a Fourth Amendment violation.

On appeal, the court held that the district court's grant of summary judgment was proper. An automobile may be used as a deadly weapon. There is a genuine issue of material fact as to the timing of the first shot, which precludes a grant of summary judgment based on Garner's justification for self-defense. The officer knew that the suspect already had committed a forcible felony and had attempted to run him down in order to escape or at least had acted recklessly with respect to that possibility. Moreover, the officer knew that the suspect was escaping at a high rate of speed through a parking lot with twelve to fourteen bystanders and demonstrating little concern for anyone's safety. Deadly force may be exercised if the suspect's actions place the officer, his partner, or those in the

immediate vicinity in imminent danger of death or serious bodily injury. Therefore, it was objectively reasonable for the officer to perceive that the bystanders in the gas station parking lot were at risk of injury from the suspect.

4. **Gaddis v. Redford Township**

364 F.3d 763 (6th Cir. 2004)

Shortly before 4:00 a.m. a police officer saw a vehicle and suspected the operator was driving while intoxicated. The officer attempted to stop the vehicle but the vehicle refused to stop. The officer finally succeeded in pulling him over after about a block. Upon requesting a license and registration, the driver informed the officer that his license was suspended (which turned out not to be true), and handed the officer an expired driver's license. Other officers arrived on the scene. The officer told the driver to get out of the car. The driver stepped out with his hands inside his pockets. The officer ordered the driver to remove his hands from his pockets. The officer grabbed the driver by the collar and pulled him slightly away from the car. The driver then removed his hands from his pockets, brandishing a knife. Officers drew their sidearms, pointing them at the driver. A standoff ensued. The suspect then stated that he wanted to leave. The first officer stepped forward and sprayed the suspect in the face with pepper spray. Another officer tried to grab the suspect. The suspect reacted violently by striking an officer with both hands. Officers then began shooting, firing a total of 16 shots at the suspect in a single burst. The suspect fell to the ground. A knife was recovered near the vehicle, but police did not fingerprint it. The suspect filed suit under 42 U.S.C. § 1983 alleging excessive force.

On appeal, the court held that the district court's grant of summary judgment was proper. The officer's initial grab of the driver as he emerged from his car was not unconstitutionally excessive force. The officer used pepper spray, an intermediate degree of non-lethal force, to subdue a suspect who had previously attempted to evade arrest, was brandishing a knife, showed signs of intoxication or other impairment, and posed a clear risk of leaving the scene behind the wheel of a car. It cannot be said that this action or the decision to grapple with the suspect was unconstitutionally excessive. The officers saw the suspect strike at another officer with a knife in his right hand. It was reasonable for them to respond with lethal force. Two officers responding simultaneously produced a larger volley but that does not change the reasonableness of their conduct.